Filed 11/26/08 In re J.E. CA2/7

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| In re J.E., a Person Coming Under the Juvenile Court Law. | B206453<br>(Los Angeles County<br>Super. Ct. No. CK32756) |
| LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>LYDIA E.,<br><br>Defendant and Appellant. | |

APPEAL from orders of the Superior Court of Los Angeles County. Sherri Sobel, Referee. Affirmed.

Niccol Kording, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Frank J. DaVanzo, Principal Deputy County Counsel, for Plaintiff and Respondent.

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Lydia E. appeals the juvenile court's denial of her petition under Welfare and Institutions Code[1] section 388, in which she requested unmonitored visitation and reunification services with her son J.E., as well as the subsequent order terminating her parental rights under section 366.26. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

J.E. was born in June 2007 to Lydia E. while she was in custody for a parole violation. Although Lydia had a longtime substance abuse problem, no drugs were found in J.E.'s system at birth. Due to Lydia's incarceration, the Department of Children and Family Services (DCFS) immediately became involved to determine who would provide care to J.E. Lydia E. initially stated that she would entrust her son to her brother and his wife so that they could obtain a legal guardianship, but then changed her mind. Lydia E.'s brother and his wife were already caring for Lydia's other child, D.E., and were in the process of adopting him. J.E.'s father's whereabouts were unknown.

As no plan had been made for the care of the baby, DCFS filed a dependency petition when J.E. was six days old, alleging that he fell within the jurisdiction of the juvenile court under section 300, subdivisions (b) (failure to protect) and (g) (no provision for support). The juvenile court ordered the child detained and placed him with his aunt and uncle.

In the time after detention but before the jurisdictional hearing, Lydia E. began an in-patient substance abuse program and then fled it; she failed to participate in two drug tests and then missed an appointment to enroll in a second in-patient facility. At the jurisdictional hearing in late August 2007, the trial court sustained the allegations of the dependency petition under section 300, subdivision (b). The court denied Lydia E. reunification services with J.E. because the court had previously terminated reunification

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[1] All statutory references are to the Welfare and Institutions Code.

services for D.E. and because Lydia E. had not made a reasonable effort to treat the problems that led to the removal of that child. (§ 361.5, subd. (b)(10).)

Lydia E. then made what appeared to have been drastic changes in her life. Within approximately one week of the jurisdictional hearing, she enrolled in an in-patient drug rehabilitation program. She underwent drug testing through her program, DCFS, and her parole office, and none revealed any use of illicit substances. She completed a parenting class and attended Narcotics Anonymous/Alcoholics Anonymous meetings daily. She consistently visited with her son twice per week and the visits were positive.

In December 2007 Lydia E. filed a section 388 petition requesting reunification services and unmonitored visits with J.E. She chronicled her progress since early September and included documentation of her in-patient program and the progress made there, the statement of her parole officer that she was testing negative for drugs on a monthly basis and that she had "shown a dramatic change and a sincere desire to be a positive parent to her child," a statement from her Narcotics Anonymous sponsor, and letters to the court from herself, her mother, and technicians in her residential program. The court ordered a hearing on the section 388 petition.

DCFS prepared a report for the section 388 petition hearing that included the following information: The DCFS visitation monitor stated that Lydia E. was very appropriate with J.E. and had not missed a visit in four months. The residential program in which Lydia E. was enrolled had expressed that she was making a positive recovery and that she now had a discharge plan that involved her moving to a sober living program. Lydia E. had been accepted at a sober living program that would permit her to live there with her baby if reunification services were granted; free child care was available nearby. Lydia E. was now on minimal parole supervision because she had no violations.

DCFS also reported that Lydia E. had been showing that she cares for her child, "bringing the diapers, wipes, and food voluntarily soon after her visits began. CSW [Children's Social Worker] has been amazed at how the baby only cried the first couple of visits . . . . The baby seems to show that they know [*sic*] his mother. CSW cannot

give any explanation for this. But J[.E.] shows no discomfort when he is with his mother. The mother began bring[ing] age appropriate toys for the baby after a couple of months as well. [¶] The mother has not missed any visits and seemed to be understanding the times that the caregiver had planned trips with the baby. The mother has been able to maintain calm when it appeared the caregiver was trying to sab[]otage her visits. Contrary to what the CSW was told they have observed the mother's oldest child to be bonded to her as well and to realize that this is hi[s] mother. He appears well adjusted and age appropriate. The mother admits her mistakes with him but had expressed that she has a relationship with him. . . [¶] . . . [¶] CSW does believe that human beings change[,] however CSW did ask the mother the question that everyone would like to know. Why now and why should everyone believe that she is sincere at this time? The mother explained that she understands this but no one will know unless she is given the chance to show that she truly loves J[.E.] and her older son. She realizes she is doing this for herself not just J[.E.] or [the older child]. She hopes she is becoming a better person as a result of taking responsibility for her actions." Attached to the report were letters from three technicians attesting to her progress in the in-patient program; a statement from a parenting instructor and chemical dependency worker about the positive steps Lydia E. had made in the program; a letter from the apprenticeship program in which Lydia E. had enrolled; a letter from Lydia E.'s new psychotherapist commenting on her motivation; a letter from a new in-patient program that had accepted Lydia E. into its program for women and children; copies of her negative drug tests; and a letter from Lydia E.'s parole officer describing her excellent standing on parole. DCFS continued to recommend that parental rights be terminated and that J.E. be placed for adoption.

At the hearing on the section 388 petition, Lydia E. presented abundant evidence of a change in circumstances. Her parole agent testified that she had tested clean on monthly drug tests for two years and that she was now on minimal supervision due to her performance on parole and her enrollment in a drug treatment program. He described Lydia E.'s "whole mentality" as having changed: "She's very positive. She's not—she's not so caught up on her past like she was—when she was, you know, supposedly using

the drugs." The parole agent stated that he would have no concern about Lydia E.'s ability to provide a safe and loving environment for a child.

The social worker assigned to the case testified that Lydia E. had graduated from her in-patient drug treatment program. She reported that Lydia E. had been randomly tested for drugs over the last seven months and had never failed a test. She confirmed that Lydia E. was in therapy, that she was working at least 30 hours per week, that she had housing, and that she continued to undergo treatment. The court commented that the social worker had written "an unbelievably supportive report" regarding Lydia E. and asked her to describe what she witnessed. The social worker testified that Lydia E. appeared "to really be bonding with the child because that's what I saw, meaning that—the baby J[.E.] Bringing things on her own, feeding him, changing diapers, being very involved, toys." She described efforts by the caretakers to sabotage Lydia E.'s visits by making multiple allegations that appeared not to be true, but observed that through all of that, Lydia E. remained calm. The social worker reported that in her opinion Lydia E. had conducted herself appropriately at all of her visits. When pressed as to why DCFS recommended denial of the section 388 petition, the social worker responded that she was concerned with the best interests of the child, who has been placed in his current placement for all of his short life and who loves his older brother, with whom he lives.

Lydia E.'s employer testified as to her work, her schedule, and her very good performance. Lydia E.'s new therapist testified about Lydia E.'s openness in therapy, the therapeutic objectives, her belief in the sincerity of Lydia E.'s desire to reunify with her son, and her assessment of Lydia E.'s progress toward responsible parenting. She testified that she believed that Lydia E. was at lower risk of future relapse because she had made sweeping changes in her life: she was not in a relationship anymore; she was working full time; she had moved into sober living; she had not relapsed while there; she was following the directions of a sponsor, a drug counselor and her parole officer. These were steps Lydia E. had been unwilling to take in the past.

Lydia E.'s substance abuse counselor testified concerning Lydia's completion of the in-patient program, her current living situation in a sober living facility with the

availability of a placement in housing for mothers and children, and her full participation in all aftercare programs.

Lydia E. testified about her housing and treatment plans, her history of visitation with J.E., and how she provided care to J.E. during visits. She testified to her relationship with her son, her desire to care for him, and the gratitude she feels to her brother and his wife, who were caring for both her children but with whom she had a strained relationship. She acknowledged that J.E. was accustomed to living with his aunt and uncle and that they had cared for him since his birth.

Lydia E.'s brother and sister in law testified to the care they had provided to J.E., to their beliefs about Lydia E.'s readiness to assume parenting duties for J.E., and their experiences with her history of substance abuse. Both opposed reunification with Lydia E.

At the conclusion of argument, the trial court stated, "This is an enormously sympathetic case because—and I must tell you, and I can tell you precisely when I woke up last night to think about this case yet again. It was 3:47 in the morning. It's not unusual for me to wake in the middle of the night if I have something that's really, really bothering me about a case and this one's really, really bothering me. [¶] . . . [¶] There are biases all over the place in this case. Nothing was done. Everything was overdone. [¶] The social worker was clearly biased against the aunt and uncle and in favor of mom. [¶] The therapist was clearly biased and in favor of mom. Of course, that's her job. To be able as a certified specialist to come to court and be positive that the mother would stay sober after five times is not helpful, but I certainly recognize where she felt the need was, to assist Lydia. [¶] The aunt and uncle are clearly biased against their sister and sister-in-law. [¶] Grandma loves everybody and is just trying to keep her family together. [¶] This has been a highlighted [section] 388 [hearing], one of the most passionate that I have seen."

The court expressed its concern about the exceptional difficulty of meeting the standard for a successful section 388 petition under the circumstances: "How a parent can overcome a 388 filing with an infant with the advent of the six-month rule, even if

services had been provided, with the advent of 361.5(b) sections, with the advent of the open adoption option, is beyond me. [¶] I cannot imagine how a parent could do it. And, in this particular case, it is heightened by the fact that the mother threw herself into her rehabilitation when she got out of custody with a one false start—I'll give her that—and really tried to clean up this time and did a wonderful job."

The court then applied the test for a section 388 petition: first, did Lydia E. demonstrate a change in circumstances? "The question after 18 years is what's changed circumstances and what's changing circumstances? [¶] Normally for this court, after six months, I would say changing. And, listening to minor's counsel, that's pretty much the thrust of her argument, that Lydia E[.] is a brand-new baby herself to sobriety; that getting sober and living sober are two extremely different things; and that Ms. E[.] is taking baby steps towards sobriety. I will give her changed circumstances because I feel that the professionals that are working with her saw a distinct, alternate spark in this time around. The quality of the sobriety is described differently. I'll give her changed."

The court turned to the second prong of the section 388 test, the best interest of the child. "The problem as I see it is the one that was articulated by both other counsel, and that is the best interest of J.[E.] [¶] To assume that J.[E.] belongs with his biological mother is an assumption[,] interestingly enough[,] that [J.E.'s older sibling. D.E.] was the example of . . . . D[.E]. was relinquished by his mother because she had a very lengthy prison sentence; five years. D[.E]. was adopted by Mrs. E[.], the grandmother. And, when her age and disabilities didn't allow her to continue that, the child was then adopted by Mr. and Mrs. E[.], who have the baby, to keep him, of course, in the family. He is a lovely young man. He's a happy young man. He recognizes the place that his mother—his biological mother. That's what he calls her: Lydia, my biological mother. He recognizes the place that she has in his life, but he has no question at all who his parents are. He holds no ill will toward her. He enjoys his time with her. He knows who his parents are.

"Add to that a baby who is fed every few hours, who has been through possibly colic, who has been through the regular shots that a baby needs, teething, diaper

changing, changing of food, all the rest that happens minute by minute by minute. That's how you measure a baby's life: minute by minute by minute. [¶] The choices that were made by Lydia E[.] did not stop when she got pregnant with J[.E.] She needed to have made those decisions while she was pregnant.

"The case law is where I go to for guidance and sometimes comfort, and that's where I went when I came in this morning. [¶] I actually looked at the case that was cited by County Counsel. I have it under *In re Aurora R.,*[2] an '06. In that case, it delineates quite well the factors one looks at when you look at a [section] 388 [petition]. [¶] It looks at the seriousness of the reason for the dependency, the reason the original dependency filing was not overcome, the relative strength of the parent and child bond, the length of time the child has been in the system, and the nature and ease by which the factors could be ameliorated.

"Affectionate closeness is not enough. Taking the social worker at her word, mother has been affectionate and close with the baby. The social worker repeatedly said mother has a wonderful demeanor with the baby. I believe that the aunt and uncle have been sabotaging the visits. [¶] No one came forward over the last six months and asked me to change one single solitary visit. No one. The social worker, however, kept repeating, there's a second prong. She didn't say it in those words, but that's what she kept on saying. 'But there's the best interest of the child.' 'There's the best interest of the child.'

"Never has Ms. E[.] had any unmonitored contact with the baby, and for the social worker to talk about a bond and how J[.] recognized his mother as the mother is absurd. This is an infant. The only person this baby recognizes, if at all, would be Shannon E[., the aunt]. Parents don't bond to children. Babies attach to parents. The Bowlby . . . and Ainsworth . . . studies haven't ever changed, and everybody throws around the word [']bonding['] here as if it has some major legal significance. It's a psychological

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[2] County Counsel suggests, and we agree, that the court probably meant to refer to *In re Aaliyah R.* (2006) 136 Cal.App.4th 437.

description of a relationship. The babies attach to the person who gives that baby daily care. A healthily attached baby, which this baby is, has no trouble being moved to another person's arms. I'm sure the baby does extremely well with Grandma. That's the nature of babies who are treated well. And so this is an easy baby. [¶] Mother's an easy visitor. And I have no reason to believe that this mother does not love J[.] She doesn't wish to do him harm. I don't expect her to hurt the baby during the visits."

The court went on to describe the case of *In re Angel B.* (2002) 97 Cal.App.4th 454 (*Angel B.*), which the court believed was similar to the instant case. "Mother was in 100 percent compliance with her case plan when we—they got to the [section] 388 [petition], although, in that case, provision of services had been done and they were probably almost at a year, maybe even at the full 18 months. Mother had done everything. She still did not get the child back. Completed her class. The court found that that was a rebuttable presumption in the absence of . . . continuous sobriety—stability by the parent, without the parent having ever parented this child, and this child was also in a home with a sibling. It was almost exactly the same pattern—fact pattern as this case, only the mother had worked a little bit longer. [¶] 'You do not move the stability of the placement of a child.' And they go on to say, if this child—and that's kind of what was in my head. 'If this child had been an older child in foster care with no other family or hope of a family, then it would have been in the child's best interest to continue to provide for the parent.' [¶] In this case, I have an infant with a family, a mother with a huge, huge history."

The court concluded, "[G]iven the age of the child, the amount of time that this child has lived with the current caretakers, which is practically since birth, I cannot find it's in the child's best interest to grant the [section] 388 [petition] and it will be denied." The trial court went on to declare J.E. adoptable and to find that the parental relationship exception did not apply because Lydia E. "does not have the relationship significant enough to outweigh the need for permanence and stability for this child." The court terminated Lydia E.'s parental rights and freed J.E. for adoption. Lydia E. appeals.

## DISCUSSION

### I. Denial of Section 388 Petition

Section 388 is a general provision permitting the court, "upon grounds of change of circumstance or new evidence . . . to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court." (§ 388, subd. (a).) The statute, an "escape mechanism" that allows the dependency court to consider new information even after parental reunification efforts have been terminated (*In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1316), permits the modification of a prior order only when the petitioner establishes by a preponderance of the evidence that (1) changed circumstances or new evidence exists; and (2) the proposed change would promote the best interests of the child. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.)

When reunification services are denied, or once they have been terminated, the focus of dependency proceedings becomes the promotion of the child's interest in a placement that is stable and permanent and that allows the caretaker to make a full emotional commitment to the child. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306.) There is a rebuttable presumption that foster care is in the child's best interest. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) The presumption becomes more difficult to rebut where the child's permanent plan is adoption and the child has lived in the prospective adoptive home for a significant period of time. (*Angel B., supra*, 97 Cal.App.4th at pp. 464-465.) A parent seeking an order for reunification services after they have been denied has the burden of proving by a preponderance of the evidence that the benefit to the child of resuming reunification efforts outweighs the benefit the child would derive from the stability of the permanent placement. (*Ibid.*) The fact that a bond exists between the parent and the child is not sufficient to meet this burden. Rather, the parent must affirmatively show that the bond is sufficient to outweigh the child's other needs, including those for "permanency, consistency, structure and insightful parenting." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 231.)

Here, the trial court concluded that changed circumstances existed but that Lydia E. had not established that the provision of reunification services and unmonitored visitation would be in J.E.'s best interest. We cannot say that this was an abuse of discretion. (*In re Stephanie M.*, *supra*, 7 Cal.4th at pp. 318-319.) Certainly Lydia E. had worked hard to change her life and to demonstrate that she could be trusted with a child. DCFS and the court were clearly impressed with all that Lydia E. had accomplished, and we too recognize that Lydia E. had made great strides in addressing her substance abuse problem and altering her life's course. But Lydia E. did not demonstrate that it was in J.E.'s best interest to inject instability into his life and to delay permanence for him in his stable placement with his aunt and uncle by belatedly offering family reunification services. J.E. had been living with his aunt and uncle since soon after his birth; his brother also lived in the home; all reports were that J.E. was thriving there. As the trial court recognized, there was no justification for disturbing this stable and successful placement, well on its way toward permanence through adoption, for what would amount to an experiment to see whether Lydia E.'s newfound sobriety could withstand parenting an infant. While Lydia E.'s love for her son and her motivation to become a parent to him are highly evident in the record, the trial court did not abuse its discretion by concluding that it was not in J.E.'s best interest to have his permanent placement delayed.

A. *In re Kimberly F.*

Lydia E. contends that the juvenile court misapplied the factors set forth in *In re Kimberly F.* (1997) 56 Cal.App.4th 519 (*Kimberly F.*). In that decision, the Court of Appeal attempted to more fully develop some of the factors that go into a determination of a child's best interests in the context of a section 388 petition. The court focused on the seriousness of the reason for the dependency in the first place, observing that not all bases for jurisdiction have equal impact on a child's interests. (*Id*. at p. 530.) Next, the court advised that the children's bonds be considered: the bond between the parent and the child; the bond between the child and the present caretakers; and the length of time

the child has been in the dependency system with its impact on parental bonds. (*Id*. at p. 531.) Finally, the court advised considering the nature of the change of circumstances, the ease or difficulty of bringing the change about, and the reason the change was not made earlier. (*Ibid*.)

Considering these factors, there was no abuse of discretion here. The reason for J.E.'s entrance to the dependency system was a grave one: his mother's longstanding substance abuse problems rendered her unable to provide care. Lydia E.'s insistence that J.E. was detained not because of her drug use but because of her incarceration on a parole violation that turned out to be invalid simply ignores the basis for the sustained dependency petition: that Lydia E.'s long-term drug abuse made her unable to provide care and supervision for J.E. just as it had rendered her unable to care for her older child, D.E. Lydia E. claims that like the parent in *Kimberly F.*, she had remedied the problem, but we cannot agree that the cases are similar. The parent in *Kimberly F.* had let her home become dirty due to the demands of taking care of a severely ill child, an issue that, while serious, "does not pose as intractable a problem as a parent's drug ingestion . . . for a child's 'best interests.'" (*Kimberly F., supra*, 56 Cal.App.4th at p. 532.) Moreover, in *Kimberly F.* the problem of an unclean home was relatively susceptible of correction (the third factor) and the degree of success of correction was easily assessed. In contrast, while there is no question that Lydia E. had made commendable progress in addressing her substance abuse problem, she was still relatively new to sobriety and was certainly not experienced at taking care of an infant while attempting to keep her newly clean life on its proper course. In neither the severity of the problem nor the certainty of its remedy is this case akin to *Kimberly F.*

Considering J.E.'s bonds, the second factor in *Kimberly F., supra*, 56 Cal.App.4th 519, Lydia E. argues that there was no dispute as to her bond with J.E., that it was a parental bond, and that there was no strong evidence of a bond between J.E. and his caretakers. She acknowledges that J.E. had a relationship with his aunt and uncle, but that the relationship "did not replace Mother's role in his life." We are well aware of the DCFS report that asserted that J.E. seemed to recognize Lydia E. as his mother. We are

also aware that the juvenile court believed that the social worker was biased and that the court disbelieved her assertion that J.E. could have recognized Lydia E. as his mother. There was evidence that this infant had been cared for by his aunt and uncle for nearly all of short life (approximately nine months as of the date the section 388 petition was denied). Evidence was also presented that J.E. "appears to be very comfortable with [his aunt and uncle] and responds positively to them as they meet his needs. J[.E.] presents as a happy baby and appears to get his needs me[t] in the home of Mr. and Mrs. E." The aunt and uncle were described as "very capable of meeting J[.E.]'s needs. They financially and emotionally have the ability to care for him. J.[E.] is currently residing with them and they provide him with a stable and loving living environment." The social worker described the home the aunt and uncle provided as "safe, stable, and nurturing." While certainly Lydia E. had done what she could to create a relationship with her son under the circumstances, there is no basis for concluding that the bond between this infant of less than one year with a mother who had monitored visits was stronger than his bond with the aunt and uncle who cared for him nearly every day of his young life. Again, this case is wholly unlike *Kimberly F.*, in which the children were years older, had lived with their mother long before the dependency proceedings began, and did not want to be adopted by their caretakers. (*Id*. at p. 532.) There is no indication here that the trial court abused its discretion or erred in its application of the factors relevant to the determination on the section 388 petition.

B. Allegedly Erroneous Reliance on *Angel B.*

The juvenile court relied, as have we, on *Angel B.*, *supra*, 97 Cal.App.4th 454. Lydia E. contends that this was erroneous because there were factual differences between that case and the present one, most notably evidence that the caretakers and the child were bonded. Here, in contrast, Lydia E. contends that there was not evidence of the relationship between J.E. and his aunt and uncle. We have already discussed the evidence of the relationship between this infant and his caregivers; there was evidence

from which the juvenile court could reasonably conclude that J.E. and his aunt and uncle were bonded.

Lydia E. next argues that "*Angel B.* places more of a burden on the parent than section 388 requires or could occur in a dependency case—making the constitutional safeguards of section 388 a nullity when applied as was done here as a broad, sweeping conclusion that without being the 'minute by minute by minute' caretaker, Mother could not show that it was in her son's best interest that she even be offered reunification services." We do not read *Angel B.*, *supra*, 97 Cal.App.4th 454 in the manner suggested. What *Angel B.* recognized, and what Lydia E. is ultimately protesting here, is that when a child spends the majority of his or her life with a capable, loving caretaker and the parent has a problem profound enough that reunification services are not offered or are discontinued, it is a difficult burden to demonstrate that a change in placement or services contemplating a change in placement is in the best interest of the child. As the court in *Angel B.* explained, "[A]s in any custody determination, a primary consideration in determining the child's best interest is the goal of assuring stability and continuity. [Citation.] When custody continues over a significant period, the child's need for continuity and stability assumes an increasingly important role. [Citation.] That need often will dictate the conclusion that maintenance of the current arrangement would be in the best interests of that child. [Citation.] Thus, one moving for a change of placement bears the burden of proof to show, by a preponderance of the evidence that there is new evidence or that there are changed circumstances that may mean a change of placement is in the best interest of the child. [Citations.] [¶] This is a difficult burden to meet in many cases, and particularly so when, as here, reunification services have been terminated or never ordered. After the termination of reunification services, a parent's interest in the care, custody and companionship of the child is no longer paramount. [Citation.] Rather, at this point, the focus shifts to the needs of the child for permanency and stability. [Citation.] In fact, there is a rebuttable presumption that continued foster care is in the best interest of the child [citation]; such presumption obviously applies with even greater strength when the permanent plan is adoption rather than foster care. A

court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, what is in the best interest of the child. [Citation.]" (*Id*. at p. 464.)

While the facts of the two cases are not identical, they need not be in order for *Angel B., supra*, 97 Cal.App.4th at p. 454 to be instructive. In both cases the children had never been in the care of their parent but had spent their lives in a prospective adoptive household with their sibling. Both mothers had made tremendous efforts to combat their drug problems and to create relationships with their children. And in both cases, the courts concluded this was not enough to demonstrate that a change in plan right before the termination of parental rights was in the best interests of the child. The *Angel B.* court wrote, "The parents in this family clearly, by deed if not by name, were Angel's parents. They, not Mother, provided Angel with all the day-to-day, hour-by-hour care needed by a helpless infant and then growing toddler. Thus, although Mother's petition states that she has bonded with Angel, and that Angel is happy to see her and reaches for her on visits, such visits, in total, add up to only a tiny fraction of the time Angel has spent with the foster parents. On this record, no reasonable trier of fact could conclude that the bond, if any, Angel feels toward Mother (as opposed to the bond that *Mother* feels toward Angel) is that of a child for a parent. [¶] Perhaps if Angel were not adoptable and Mother was the only mother-figure in Angel's life, and Angel's only hope of having a family in the future, the result might be different. [Citation.] But those are not the facts presented here." (*Id*. at p. 465.) While *Angel B.* did not dictate the results here, Lydia E. has not shown that the juvenile court abused its discretion by analogizing to this decision in denying the section 388 petition.

In a related argument that is frequently repeated in her brief, Lydia E. claims that the court erroneously believed it was impossible to award reunification services under section 388 under these circumstances. She refers to the court's comment, quoted above, that it was "beyond me" how a parent could meet the standard of a section 388 petition with an infant under the current statutory scheme. We do not understand the court's words as indicating it believed itself to be legally prohibited from granting the requested

relief; instead, the court was commenting on the practical difficulty of succeeding on a section 388 petition under circumstances like those here.

Lydia E. contends that this purported "predisposition" to rule against her created an "unreasonable hurdle where the outcome has been decided before the evidence was even submitted" and rendered the hearing a mere formality. We see no indication that this was a sham hearing designed to support a predetermined conclusion. The trial court talked about waking up in the middle of the night thinking about this troubling case and spoke extensively and with apparently conflicted feelings about its decision. The barrier for Lydia E. is not one of improper prejudging, it is the law. Once reunification services are terminated or they are not offered, how very much a parent wants to reunify with his or her child and how much work he or she has done to make reunification possible is no longer a major focus of the inquiry; the question is the best interest of the child, with a special focus on the needs of the child for permanence and stability. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) While the outcome was not decided before the hearing, the law erected a high barrier to a successful petition here. As the juvenile court's comments here indicate, the court found that ultimately the best interest of this child—who was less than a year old, had lived his whole life with his aunt and uncle and with his brother whom the aunt and uncle had already adopted, in circumstances that were positive and healthy for him, who was about to be freed for adoption by these willing and able prospective adoptive parents—was not served by bringing to a grinding halt the road to permanence of this stable and beneficial placement in order to see if his loving and newly recovering mother could, with reunification services, assume custody of him for the first time. The juvenile court did not abuse its discretion in concluding that it had not been shown that the belated provision of reunification services was in J.E.'s best interest.

C. Alleged Errors Pertaining to Evidence

Lydia E. argues that the court acted arbitrarily and capriciously in drawing conclusions from evidence allegedly not offered by the parties. She claims that there was

no evidence from which to conclude that Lydia E. had an 18-year drug history because that allegation was stricken from the petition. Not only was Lydia E.'s longstanding drug abuse problem acknowledged by all parties in the proceedings, but Lydia E.'s own witness, her therapist, testified to Lydia E.'s 17-year history of using drugs. The fact that the petition was sustained as amended to refer to "an extremely lengthy history of illicit drug abuse" rather than using a specific number of years is irrelevant to the fact that there was substantial and uncontested evidence of Lydia E.'s long-term drug abuse problem.

Lydia E. next contends that the court concluded that J.E. could not have recognized Lydia E. as his parent based on studies that were not in evidence or provided to counsel. This argument refers to the portion of the court's comments, set forth in full above, in which the court explained that it strongly doubted the social worker's assertion that J.E. recognized Lydia E. as his mother. The court explained that it gave little credence to this claim because Lydia E. was not his primary caretaker, he was an infant, and he was receiving excellent care from his aunt and uncle. The court observed that J.E. was healthily attached to his aunt and uncle, and concluded that it was far more likely that J.E.'s secure attachment to his caregivers caused him to accept his loving, eager and attentive visiting mother rather than some understanding that Lydia E. was his parent. The court's conclusion that J.E. was "an easy baby" of which Lydia E. complains was made in this context, that J.E.'s secure attachment and loving treatment made him amenable to close contact with those other than the primary caretakers, such as his mother and grandmother. This assessment of the evidence was well within the court's discretion as the trier of fact. (*In re Albert T.* (2006) 144 Cal.App.4th 207, 216.)

Lydia complains that the court concluded that changing the baby's name from J.E. to another name was "insignificant to the relationship" of Lydia E. and J.E. Lydia E. cites to a page in the record where this finding is supposedly contained, but that page does not refer to the name of the baby at all. Where the court discussed J.E.'s name, the court did not make any finding that the purported name change was insignificant, but instead said, "I don't believe they [the aunt and uncle] renamed the baby." From the evidence at the hearing there was some question as to who named the baby first, and the

trial court declined to make a factual finding as to exactly how the name divergence came to exist. The trial court did not give any indication of relying on naming in making its determination on the section 388 petition, nor has Lydia offered any explanation of how this issue, or the court's comments, were relevant to the determination on the petition.

Lydia next protests that the trial court "relied on its own recollection of J[.]'s sibling's adoption in forming its reasoning to deny the petition." This is not borne out by the record. The court merely mentioned, "I did the original adoption of [older sibling] with Grandma so I remember this family from quite some time ago." The juvenile court never made any statement that would suggest that it was relying on memory of past hearings over the evidence set forth at the hearings in J.E.'s case.

Next, Lydia asserts that the court mischaracterized the testimony of J.E.'s older brother, D.E. concerning how he refers to Lydia E. Although Lydia E. does not include any reference to the court's decision in her argument on this point, it appears that she is referring to the court's comments that D.E. "recognizes the place that his mother—his biological mother. That's what he calls her: Lydia, my biological mother. He recognizes the place that she has in his life, but he has no question at all who his parents are. He holds no ill will toward her. He enjoys his time with her. He knows who his parents are." Lydia complains that the term "biological mother" was only used by the older brother after the questioning attorney supplied the term during D.E.'s testimony. We have reviewed the testimony in question and note that the term "biological mother" was not used by D.E.; instead, when the court asked who the boy was testifying about when he said "mom," he began to use the phrase, "birth mom" at the suggestion of counsel. The trial court's specific recollection may have been in error, but its overall characterization of the child's testimony was perfectly accurate. D.E. testified that he has referred to his aunt and uncle as his mom and dad since they adopted him, and Shannon E. testified that D.E. calls Lydia E. "Lydia." D.E. described visits with Lydia E. and having fun with her, but also mentioned that Lydia E. got mad easily and only lived with him sometimes when he lived with his grandmother. Not only do these comments by the trial court appear not to have been salient at all to its decision, but the court fairly

characterized the child's testimony overall even as it erred in its memory of exactly how the child referred to Lydia E. Lydia has not demonstrated that this shows any abuse of discretion by the trial court.

## II. Order Terminating Parental Rights

At a hearing under section 366.26, the court must select and implement a permanent plan for a dependent child. Where there is no probability of reunification with a parent, adoption is the preferred permanent plan. (*In re Edward R.* (1993) 12 Cal.App.4th 116, 122.) In order for the juvenile court to implement adoption as the permanent plan, it must find, by clear and convincing evidence, that the minor is likely to be adopted if parental rights are terminated. (§ 366.26, subd. (c)(1).) Then, in the absence of evidence that a relative guardianship should be considered (§ 366.26, subd. (c)(1)(A) or that termination of parental rights would be detrimental to the child under one of six statutorily-specified exceptions (§ 366.26, subd. (c)(1)(B)(i)-(vi)), the juvenile court "shall terminate parental rights." (§ 366.26, subd. (c)(1).) Here, the juvenile court found J.E. to be adoptable, and finding no reason that the termination of parental rights would be detrimental to her, terminated Lydia E.'s parental rights.

Lydia E. contests the sufficiency of the evidence to support the juvenile court's ruling that the exception contained in section 366.26, subdivision (c)(1)(B)(i) has not been satisfied here. Most courts review a trial court's determination that the section 366.26, subdivision (c)(1)(B)(i) exception does not apply for substantial evidence (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576 [considering former § 366.26, subd. (c)(1)(A)]), although at least one court has concluded that it is properly reviewed for an abuse of discretion. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 [considering former § 366.26, subd. (c)(1)(A)].) We need not resolve this difference of opinion here, for under either standard the termination of parental rights would be upheld. Analyzing the court's ruling under the more exacting standard, we affirm the order because it is supported by substantial evidence.

There is no question but that at the time of termination of parental rights the relationship between Lydia E. and J.E. was loving, warm, and enjoyable for both mother and son. However, the evidence did not establish the kind of parental relationship that section 366.26, subdivision (c)(1)(B)(i) was designed to preserve.[3] To establish the parental relationship exception, "the parents must do more than demonstrate 'frequent and loving contact' [citation], an emotional bond with the child, or that the parents and child find their visits pleasant. [Citation.] Rather, the parents must show that they occupy 'a parental role' in the child's life. [Citation.]" (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108-1109.) A beneficial relationship within the 366.26, subdivision(c)(1)(B)(i) exception is one that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.)

Lydia E. did not demonstrate that her relationship with J.E. rose to this parental level. She demonstrated that she visited regularly and consistently and brought along appropriate items to those visits, and that she cared for him during visits. J.E. clearly felt comfortable with Lydia E., although the trial court disbelieved the view of the social worker that J.E. appeared to recognize her as his mother; the trial court termed their relationship as "an affectionate closeness." This testimony evinces regular visitation and a loving relationship between J.E. and his mother, but it does not demonstrate that the relationship reached the level at which the parental relationship exception would apply. The evidence of Lydia E. and J.E.'s relationship failed to establish that the parental relationship promoted J.E.'s well-being to the point that it would outweigh the well-being J.E. would gain by being adopted by his aunt and uncle, the prospective adoptive parents. (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.) Accordingly, substantial evidence

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[3] Section 366.26, subdivision (c)(1)(B)(i) provides that the court may decline to terminate parental rights if it finds a compelling reason for determining that termination of rights would be detrimental to the child because "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

supported the trial court's finding that the section 366.26, subdivision (c)(1)(B)(i) exception did not apply.

## DISPOSITION

The orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.